14 No. 185

In The
Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Given that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Federal Circuit Courts of Appeals have conclusively and affirmatively held that they have jurisdiction over denials by the Board of Immigration Appeals of requests to equitably toll motions to reopen, the question presented is:

> Whether the Fifth Circuit Court of Appeals erred in this case in holding that it has no jurisdiction to review Petitioner's request that the Board equitably toll the 90-day deadline on his motion to reopen as a result of ineffective assistance of counsel under 8 C.F.R. § 1003.2(c)(2).

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for rehearing en banc, *Mata v. Holder*, No. 13-60253 (5th Cir. May 16, 2014), is unreported.

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review, *Mata v. Holder*, No. 13-60253 (5th Cir. March 5, 2014), is unreported.

The decision of the Board of Immigration Appeals ("BIA") denying Petitioner's motion to reconsider, Noel Reyes Mata, A200-723-795 (BIA, June 27, 2013), is unreported.

The decision of the Board of Immigration Appeals denying Petitioner's motion to reopen, Noel Reyes Mata, A200-723-795 (BIA, March 22, 2013), is unreported.

The decision of the Board of Immigration Appeals summarily dismissing Petitioner's appeal, Noel Reyes Mata, A200-723-795 (BIA, Sept. 21, 2012), is unreported.

The Oral Decision and Order of the Immigration Judge, Noel Reyes Mata, A200-723-795 (Immigration Judge, August 24, 2011), finding Petitioner ineligible for cancellation of removal is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on March 5, 2014 and his petition for rehearing en banc on May 16, 2014. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."

APPLICABLE LAW

8 U.S.C. § 1229a(c)(7)(A), which provides,

> An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

8 U.S.C. § 1229a(c)(7)(C)(i), which provides,

> Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

8 C.F.R. § 1003.2(c)(1), which provides,

> In general. – A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to

reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

8 C.F.R. § 1003.2(c)(2), which provides,

Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings

(whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

8 C.F.R. § 1003.2(a), which provides,

General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

STATEMENT OF THE CASE AND RELEVANT FACTS

This case involves the Fifth Circuit Court of Appeal's application of 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. § 1003.2(c)(2), which concern an alien's motion to reopen. The specific issue is whether a request to equitably toll the 90-day deadline provided in the statute and regulation is a non-jurisdictional claim-processing rule subject to equitable tolling that is reviewable by the judiciary.

Petitioner was convicted for misdemeanor assault. He conceded removability, and sought cancellation of removal under 8 U.S.C. § 1229a(b) which was denied. He appealed to the BIA, but his attorney failed to file a brief. More than 90 days later, he filed a motion to reopen with new counsel, asserting ineffective assistance of counsel against his prior attorney. The BIA refused to equitably toll the deadline for motions to reopen. Inexplicably, the Board found that Respondent was not prejudiced because his argument on the merits was presented to the Board in a supplemental brief instead of a "proposed appellate brief." The BIA thus denied the motion to reopen as well as a subsequent motion to reconsider. Petitioner filed timely petitions for review of both decisions, asking the Fifth Circuit Court of Appeals to overrule the BIA's decision not to equitably toll the deadline on motions to reopen.

On March 5, 2014, the Fifth Circuit panel dismissed Petitioner's appeal on the grounds that it

lacked jurisdiction to review the BIA's denial of Respondent's request for equitable tolling of the statutory deadline on motions to reopen. App. 1-3. The panel acknowledged that Petitioner conceded that his motion to reopen was filed outside of the 90-day window provided by 8 C.F.R. § 1003.2(c)(2). App. 2. *See also* 8 U.S.C. § 1229a(c)(7)(C)(i). The panel also acknowledged that Petitioner asserted that the BIA should have equitably tolled the filing period because of the ineffective assistance of prior counsel. App. 2. However, the panel then cited its unique doctrine, announced in *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008), that an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed in the Fifth Circuit as an invitation for the BIA to exercise its discretion to reopen the removal proceedings *sua sponte*. App. 2. Consequently, because the Fifth Circuit holds (as do all the other circuits) that there is no meaningful standard against which to judge the Board's exercise of its *sua sponte* power, the Court had no jurisdiction to review the request for equitable tolling. App. 2-3.

Petitioner's qualm is not with the second step of the Fifth Circuit's logic, that the Board's *sua sponte* discretion is unreviewable, but with the first step, that a request for equitable tolling is equivalent to a request for *sua sponte* power. It is only with this latter contention that Petitioner disagrees, as do all of the other Federal Circuit Courts of Appeals.

Petitioner contends that the Fifth Circuit's analysis is incorrect because of this Court's ruling in

Henderson v. Shinseki, 131 S. Ct. 1197, 179 L. Ed. 2d 259 (2011). *Henderson* found that "claim-processing rules," which "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times," are "[a]mong the types of rules that should not be described as jurisdictional." *See Henderson*, 131 S. Ct. at 1203.

Petitioner therefore argues that in light of *Henderson* the filing deadline in 8 C.F.R. § 1003.2(c)(2) is a claim-processing rule seeking to promote the orderly progress of litigation and hence is subject to equitable tolling. Petitioner is not alone in his argument that there is judicial review of a denial of a request for equitable tolling; every other Federal Circuit Court has concluded that it has jurisdiction to review the BIA's decision not to apply equitable tolling, as will be demonstrated, *infra*. Furthermore, the Fifth Circuit has declined to follow this Court's precedent in *Henderson* or align itself with every other Circuit Court of Appeals on this issue. The Fifth Circuit's precedent in *Ramos-Bonilla v. Mukasey* that a request for equitable tolling of the 90-day deadline on motions to reopen is an implied request for the BIA to use its *sua sponte* authority has no foundation in the law and contradicts numerous precedents. Because the 90-day deadline is not jurisdictional, equitable tolling is implied, as it is in every federal statute absent the express contrary intent of Congress. Therefore, Petitioner urges this Court to grant certiorari and reverse the Fifth Circuit's denial on jurisdictional grounds.

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA § 242(a)(1), 8 U.S.C. § 1252(a)(1), which provides for judicial review of a final order of removal.

B. Background

The Petitioner, Mr. Noel Reyes Mata, is a native and citizen of Mexico. On September 14, 2010, he was convicted for misdemeanor assault pursuant to Tex. Penal Code § 22.01(a). App. 15.

C. Before the Immigration Judge

On January 24, 2001, Petitioner admitted the allegations against him, conceded removability, and sought cancellation of removal under 8 U.S.C. § 1229a(b). App. 14-15. The immigration judge denied the application for cancellation of removal. App. 18.

D. Administrative Appeal

Petitioner's former counsel timely filed a Notice of Appeal with the BIA, but he negligently failed to file a brief. App. 6. As a result, the BIA summarily dismissed Petitioner's appeal on September 21, 2012. App. 7.

Subsequently, Petitioner retained new counsel and, on January 14, 2013, filed a motion to reopen his case based on ineffective assistance of counsel

pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA). App. 7. However, the BIA held the motion to reopen to be untimely as it was filed 25 days after the statutory 90-day deadline for motions to reopen, even though Petitioner was not aware of his former counsel's negligence until after such deadline had elapsed. App. 6-7. The Board stated that the deadlines for motions to reopen could be equitably tolled, but refused to do so, claiming that Petitioner had not shown prejudice. The BIA also denied the motion because Petitioner had not jointly submitted a proposed appellate brief along with the motion to reopen under *Matter of Lozada*.[1] App. 8.

Petitioner filed a petition for review with the Fifth Circuit Court of Appeals on April 18, 2013.

On April 19, 2013, Petitioner filed a motion to reconsider the denial of the motion to reopen with the BIA, submitting the proposed appellate brief in the form dictated by the Board in its prior decision. App. 4-5. On June 27, 2013, the BIA dismissed the motion to reconsider on the basis that the proposed appellate brief should have been submitted with the motion to reopen. App. 4.

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[1] The BIA's decision in this regard was excessively formalistic, particularly considering that Petitioner had filed a supplemental memorandum containing his proposed legal argument on the merits. The Board noted the filing of the supplemental motion in its footnote, and even responded to the legal argument, despite stating incorrectly that the argument was not properly before it. [SAR 67].

Petitioner filed a second petition for review with the Fifth Circuit Court of Appeals on July 26, 2013.

E. Judicial Review

On March 5, 2014, the Fifth Circuit panel dismissed Petitioner's petitions for review on the grounds that the Court lacked jurisdiction to review the BIA's denial of Petitioner's request for equitable tolling of the statutory deadline on motions to reopen. App. 2-3. The panel acknowledged that Petitioner conceded that his motion to reopen was filed outside of the 90-day window provided by 8 C.F.R. § 1003.2(c)(2). App. 2. *See also* 8 U.S.C. § 1229a(c)(7)(C)(i). The panel also acknowledged that Petitioner asserted that the BIA should have equitably tolled the filing period because of the ineffective assistance of prior counsel. App. 2. However, the panel then cited its unique doctrine, announced in *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008), that an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed in the Fifth Circuit as an invitation for the BIA to exercise its discretion to reopen the removal proceedings *sua sponte*. App. 2-3. Consequently, because the Fifth Circuit holds (as do all the other circuits) that there is no meaningful standard against which to judge the Board's exercise of its *sua sponte* power, the Court held it had no jurisdiction to review the request for equitable tolling. App. 3.

Petitioner then filed a Petition for Rehearing En Banc, arguing that the Fifth Circuit should overturn

Ramos-Bonilla v. Mukasey. The Petition for Rehearing was dismissed on May 16, 2014. App. 24-25.

ARGUMENT FOR ALLOWING THE WRIT

The issue in this case is whether the Fifth Circuit has jurisdiction to review the BIA's decision not to grant equitable tolling where an alien files a motion to reopen under 8 C.F.R. § 1003.2(c) based on ineffective assistance of counsel beyond the 90-day deadline stated in that regulation as well as 8 U.S.C. § 1229a(c)(7)(C)(i). In its denial of Petitioner's petition for review, the Fifth Circuit misunderstood the implications of *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203-04, 179 L. Ed. 2d 259 (2011), which held that claim-processing rules are not jurisdictional and permit equitable tolling. The implication of *Henderson* is that an 8 C.F.R § 1003.2(c) motion to reopen is not jurisdictional, but is merely a claim-processing rule, and as such it is subject to equitable tolling. Because the equitable power to toll statutes of limitations is "read into every federal statute of limitation," the Fifth Circuit's construal that a request for equitable tolling requires the invocation of the BIA's *sua sponte* authority is incorrect. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 743 (1946).

All of the Federal Circuit Courts of Appeals except for the Fifth Circuit now agree that they have jurisdiction to review a decision of the Board of

Immigration Appeals denying a claim for equitable tolling of the 90-day deadline for a motion to reopen. Most have explicitly relied on the logic that the 90-day deadline is a claim-processing rule or a statute of limitations as opposed to being jurisdictional and therefore naturally subject to equitable tolling. *See Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011) ("Those numerosity and timeliness requirements are not jurisdictional and therefore qualify for equitable tolling if the petitioner has been diligent."); *Borges v. Gonzalez*, 402 F.3d 398 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013) ("Every circuit to have addressed the issue [of the 90-day statutory deadline for motions to reopen] has held that this provision constitutes a statute of limitations to which the principles of equitable tolling apply."); *Joshi v. Ashcroft*, 389 F.3d 732, 734-35 (7th Cir. 2004) (distinguishing between deadlines that govern transitions from one court to another, which are jurisdictional, and number and time limitations, which are not and can be equitably tolled); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) ("After an examination of the text, structure, legislative history, and purpose of Congress's 1990 amendment to the INA, we join the Second and Ninth Circuits and agree that there is no indication, either explicit or implicit, that Congress intended that this limitations period not be equitably tolled.") (internal citations omitted); *Avila-Santoyo v. AG*, 713 F.3d 1357, 1365 (11th Cir. 2013) ("the 90-day deadline for a motion to reopen is a non-jurisdictional claim-processing rule subject to equitable tolling").

In its argument that it lacks jurisdiction to consider an alien's petition for review of a denial of equitable tolling by the BIA, the Fifth Circuit relied on its precedent decision in *Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008). In *Ramos-Bonilla*, the Fifth Circuit determined that a request for equitable tolling is, in effect, a request for the BIA to exercise its *sua sponte* authority, and is therefore unreviewable. 543 F.3d at 220.

Petitioner contends that the Fifth Circuit's holding in *Ramos-Bonilla* was entirely unfounded and runs counter to decades of jurisprudence on the issue of equitable tolling. It has long been understood that the power to equitably toll a statute of limitations has rested with the courts in equity and need not be provided for by law. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (finding that equitable tolling is "read into every federal statute of limitation"); *see also Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle") (internal quotation marks and citations omitted); *see, e.g., Jones v. Conoway*, 4 Yeates 109 (Pa. 1804) (applying the doctrine of equitable tolling).

Additionally, even if the Fifth Circuit's precedent in *Ramos-Bonilla* were not counter to decades of jurisprudence, it additionally creates a Suspension

Clause issue. As the Second Circuit correctly reasoned in *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011), "[i]f petitioners lack a forum in which to raise such [ineffective assistance of counsel and government interference] claims, then we are confronted squarely with the 'serious constitutional questions' raised by the Supreme Court in *St. Cyr*" (*referencing INS v. St. Cyr*, 533 U.S. 289, 315, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)). Because Petitioner was deprived of a motion to reopen due to ineffective assistance of counsel, his right to habeas corpus under the U.S. Constitution has been infringed, which the Fifth Circuit should have found created jurisdiction as a constitutional question.

The Fifth Circuit's construal of requests for equitable tolling as implied invocations of the BIA's *sua sponte* power stands in opposition to the holdings of every other Federal Circuit Court, all of which have found that they have the power to review an alien's request for equitable tolling of a statutory motion to reopen under § 1003.2(c)(2). We therefore ask that this writ be granted to resolve the Fifth Circuit's break with every other U.S. court of appeals and with this well-established rule.

A. An alien's request for equitable tolling of the 90-day statute of limitations on motions to reopen is reviewable as a non-jurisdictional claim-processing rule under *Henderson*.

In *Henderson*, this Court discussed its attempts to "bring some discipline" to the use of the "jurisdictional label." *Henderson v. Shinseki*, 131 S. Ct. at 1202. *Henderson* involved a veteran's failure to file a notice of appeal for the denial of benefits to the Veteran's Court within a 120-day period. 131 S. Ct. at 1201. He had missed the deadline by 15 days. *Id.* The issue before the Court was whether or not the rule was jurisdictional, since a jurisdictional rule cannot be excused based on equitable factors. *Id.* at 1202. The Court explained that rules should not be considered jurisdictional unless it governs a court's adjudicatory capacity. The Court explained, however, that "claim-processing rules" that "seek to promote the orderly progress of litigation" are generally not jurisdictional and are therefore subject to judicial review. *Id.* at 1202-03. In determining whether or not a rule is jurisdictional, the intent of Congress is key. The Court concluded there was not any indication that Congress intended the rule at issue to be jurisdictional. *Id.*

Petitioner contends that according to *Henderson* the 90-day deadline under 8 C.F.R. § 1003.2(c) and 8 U.S.C. § 1229a(c)(7)(C)(i) for motions to reopen is not jurisdictional, but rather is a claim-processing rule subject to judicial review. As stated *supra*, equitable

power to toll is "read into every federal statute of limitation," so it follows logically that the Fifth Circuit had jurisdiction to review the BIA's denial of Petitioner's request for equitable tolling, considering that a request for equitable tolling of the § 1003.2(c)(2) statute of limitations is intrinsically intertwined with the statute itself. *Holmberg*, 327 U.S. at 397.

B. A request for equitable tolling is not an invitation for the BIA to exercise its *sua sponte* authority; rather, it is an equitable right descending from multiple decades of legal precedent.

The Fifth Circuit incorrectly held in *Ramos-Bonilla* that a request for equitable tolling is essentially an invitation for the BIA to use its *sua sponte* discretion. *Ramos-Bonilla*, 543 F.3d at 220 ("a request for equitable tolling of a time- or number-barred motion to reopen on the basis of ineffective assistance of counsel is 'in essence an argument that the BIA should have exercised its discretion to reopen the proceeding sua sponte based upon the doctrine of equitable tolling'"), *quoting Ben Jie Lin v. Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam) (unpublished). *Ben Jie Lin*, however, cited no authority for this rule. In short, the precedent upon which the Fifth Circuit decided this entire case not only contradicts all other authority but is entirely bootstrapped. *Ramos-Bonilla* relies on nothing but an unpublished decision which in turn relies on nothing, not even an argument.

Again, it is important to distinguish between the rule (accepted by none but the Fifth Circuit) that equitable tolling is an implied request for *sua sponte* authority from the rule (accepted in every circuit) that there is no judicial jurisdiction of the Board's use of its *sua sponte* authority.

The power to equitably toll statutes of limitations arises from decades of judicial precedent. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (finding that equitable tolling is "read into every federal statute of limitation"); *see also Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle[.]") (internal quotation marks and citations omitted); *see also Jones v. Conoway*, 4 Yeates 109 (Pa. 1804) (applying the doctrine of equitable tolling). The Fifth Circuit's interpretation that "equitable tolling is not a basis for filing an untimely or numerically-barred motion under the statute or regulations," fails to recognize that there is no need for a statutory provision for equitable tolling because equitable tolling is simply assumed to exist where it is not explicitly disclaimed. *Ben Jie Lin*, 286 Fed. Appx. at 150; *Young*, 535 U.S. at 49-50. As such, the *Ramos-Bonilla* line of precedent has been incorrect in finding that the statute of limitations could only be tolled by the BIA's *sua sponte* authority.

C. The Fifth Circuit's rule – that a request for the BIA to equitably toll the deadlines on a motion to reopen is in essence a request for the BIA to utilize its *sua sponte* authority – strips aliens of the right to habeas corpus relief and denies them of their rights under the Suspension Clause.

Assuming, *arguendo*, that the Fifth Circuit was correct that equitable tolling may only be applied by the discretion of the BIA, the Fifth Circuit would still have jurisdiction to review the BIA's decision under constitutional grounds because of a Suspension Clause violation. In its precedent decision finding that it cannot consider the BIA's decision to exercise or not exercise its *sua sponte* authority, the Fifth Circuit relies on authority stemming from *Heckler v. Cheney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985) ("review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion").

In *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), this Court explained the scope of constitutional habeas protection required for aliens. The Court held that aliens are entitled to habeas protection at least "as it existed in 1789." 533 U.S. at 301 (*quoting Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). The Court conducted a historical review of the scope of habeas jurisdiction not only on issues of statutory construction, but it also stated that such review traditionally "encompassed

detentions based on errors of law, including the erroneous application or interpretation of statutes," *id.* at 302, challenges to "[e]xecutive interpretations of the immigration laws," *id.* at 307, determinations of an alien's "statutory eligibility for discretionary relief," *id.* at 314 n.38, and "questions of law that arose in the context of discretionary relief," *id.* at 307.

The Suspension Clause of the U.S. Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The Court stated that "some judicial intervention in deportation cases is unquestionably required by the Constitution" because of that clause. *St. Cyr*, 533 U.S. at 300. "[T]he question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus." *Boumediene v. Bush*, 553 U.S. 723, 771, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008). Some circuits have suggested that the 8 C.F.R. § 1003.2(c) motion to reopen serves as a substitute for habeas corpus. *See Luna v. Holder*, 637 F.3d 85, 95 (2d Cir. 2011) ("[i]f Petitioners lack a forum in which to raise [habeas] claims, then we are confronted squarely with the 'serious constitutional questions' raised by the Supreme Court") (*citing St. Cyr*, 533 U.S. at 314).

While the Fifth Circuit may be correct that it is unable to consider the BIA's ruling on purely discretionary matters, the BIA's interpretation of the law

and of constitutional issues is not purely discretionary. The Circuit Courts have the power to consider discretionary agency decisions without impinging on the discretion of the agency. *See Kucana v. Holder*, 558 U.S. 233, 248, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010) ("[a] court decision reversing the denial of a motion to reopen does not direct the Executive to afford the alien substantive relief; ordinarily, it touches and concerns only the question whether the alien's claims have been accorded a reasonable hearing"). Additionally, the motion to reopen serves as "an important safeguard" and is necessary to "ensure a proper and lawful disposition." *Dada v. Mukasey*, 554 U.S. 1, 3, 128 S. Ct. 2307, 171 L. Ed. 2d 178 (2008); *reaffirmed in Kucana v. Holder*, 558 U.S. 233, 235, 130 S. Ct. 827, 829, 175 L. Ed. 2d 694 (2010).

Here, as a result of ineffective assistance of counsel (itself potentially a constitutional due process violation, *see Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), Petitioner's right to his statutory motion to reopen was taken away, which, according to *Luna v. Holder*, *supra*, violates the Suspension Clause. Therefore, even if the Fifth Circuit is correct that a request for equitable tolling to the BIA is a request for the BIA's *sua sponte* authority, the Circuit Courts of Appeals must have jurisdiction in any case because the lack of right to a motion to reopen or some other habeas substitute is a constitutional violation.

The Fifth Circuit's construal of a request for equitable tolling as an invitation for the BIA to exercise

its *sua sponte* authority eliminates the adequacy of the § 1003.2(c) motion to reopen as a habeas substitute by limiting the habeas right without explicit Congressional intent to do so. *See INS v. St. Cyr*, 533 U.S. at 298 ("For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction."). The Fifth Circuit's rule has created a constitutional problem where one need not exist. The precedent in *Ramos-Bonilla* unduly restricts the habeas right of Petitioner and should therefore be overruled to allow the Petitioner to seek some form of habeas relief under the Suspension Clause.

D. The Fifth Circuit's decision creates an unnecessary circuit split because every other circuit recognizes that it has the jurisdiction to review requests for equitable tolling.

As previously stated, Petitioner's argument that the Fifth Circuit has jurisdiction to consider his request for equitable tolling due to ineffective assistance of counsel is supported by ten out of eleven circuits to have considered the issue. As the following case law demonstrates, the Fifth Circuit is now entirely alone in this position as every other circuit court has now held that it has jurisdiction over claims of equitable tolling since the deadlines in 8 U.S.C.

§ 1229a(c)(6-7) do not implicate subject matter jurisdiction.

Although the First Circuit has "declined to resolve whether the INA's procedural limitations are further subject to equitable tolling for exceptional circumstances such as ineffective assistance of counsel," *Muyubisnay-Cungachi v. Holder*, 734 F.3d 66, 72 (1st Cir. 2013), it disagrees with the Fifth Circuit as to whether it holds jurisdiction in such a situation. *See Neves v. Holder*, 613 F.3d 30, 35-37 (1st Cir. 2010) ("We hold that we have jurisdiction to review the BIA's decision to deny equitable tolling of the time and number limitations governing Neves's second motion to reopen but not to review the BIA's refusal to exercise its *sua sponte* authority to reopen."). Prior to *Neves*, the First Circuit had held that it lacked jurisdiction over all motions to reopen, but it reversed its prior position based on the U.S. Supreme Court's holding in *Kucana v. Holder*, 558 U.S. 233, 130 S. Ct. 827, 175 L.Ed.2d 694 (2010), that "decisions on motions to reopen proceedings, like other proceedings made discretionary by regulation and not by statute, are generally subject to judicial review." *Id.* at 33.[3]

The Second Circuit in *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011), held that for the statutory right to a

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[3] It appears that *Kucana*'s holding had no direct impact on the Fifth Circuit's jurisprudence because the Fifth Circuit had correctly determined as early as 2005 that it retained jurisdiction over the BIA's denials of motions to reopen immigration proceedings. *See Zhao v. Gonzalez*, 404 F.3d 295, 303 (5th Cir. 2005).

motion to reopen to be a valid substitute for habeas relief, the BIA may not preclude a claim for equitable tolling. *Id.* at 99 ("An alien who files a motion to reopen is entitled to equitable tolling when he exercises due diligence in filing the motion and shows that he was prevented by ineffective assistance of counsel or governmental interference from filing the motion on time. *See id.* If the BIA denies such equitable tolling, the alien may petition this Court for review of that decision.") *See also Iavorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000) (finding 90 days may be equitably tolled but denying tolling on facts where counsel never filed appeal for lack of due diligence). The Second Circuit has also held that counsel's performance can be "so ineffective as to have impinged on the fundamental fairness of the hearing in violation of the [F]ifth [A]mendment due process clause." *Saleh v. Dept. of Justice*, 962 F.2d 234, 241 (2d Cir. 1992).

The Third Circuit also permits equitable tolling of the 90-day deadline on motions to reopen if the petitioner has shown due diligence. *See Alzaarir v. Att'y Gen. of U.S.*, 639 F.3d 86, 91 (3d Cir. 2011); *Borges v. Gonzalez*, 402 F.3d 398 (3d Cir. 2005). In *Borges*, the Third Circuit found that the 180-day deadline for filing a motion to reopen following an *in absentia* order was subject to equitable tolling because it was analogous to a statute of limitations rather than being jurisdictional. 402 F.3d at 406.

The Fourth Circuit has explicitly stated that because "[e]very circuit to have addressed the issue [of the 90-day statutory deadline for motions to reopen]

has held that this provision constitutes a statute of limitations to which the principles of equitable tolling apply," it "agree[s] with [its] sister circuits and now hold[s] that § 1229a(c)(7)(C)(i) sets forth a limitations period that can be equitably tolled." *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013).

The Sixth Circuit permits equitable tolling of the 90-day deadline on motions to reopen if the petitioner has shown due diligence. *See Gordillo v. Holder*, 640 F.3d 700, 704-06 (6th Cir. 2011) (time was equitably tolled and court found due diligence despite five year delay in seeking reopening where petitioner inquired of three lawyers and a notary and was never told he qualified for NACARA).

The Seventh Circuit also falls with the majority. In *Gaberov v. Mukasey*, 516 F.3d 590, 593-97 (7th Cir. 2008), the court granted a motion to reopen an order denying asylum by applying equitable tolling of the four-year-old order, where the petitioner erroneously received another person's final order, inquired, and was told his case was still pending. Additionally, in *Joshi v. Ashcroft*, 389 F.3d 732, 734-35 (7th Cir. 2004), the court distinguished between deadlines that govern transitions from one court to another, and number and time limitations. *Id.* The latter are jurisdictional and cannot be equitably tolled, but the former are not jurisdictional and can be equitably tolled. *Joshi*, 389 F.3d at 734-35; *see also Yuan Gao v. Mukasey*, 519 F.3d 376, 379 (7th Cir. 2008) (a 75-day wait to file motion to reopen was deemed to be lack of due diligence).

The Eighth Circuit has also adopted the majority position. *See Valencia v. Holder*, 657 F.3d 745, 748-49 (8th Cir. 2011) (a wait of three years to file motion to reopen with new counsel was not due diligence).

The Ninth Circuit permits equitable tolling if the petitioner is prevented from filing "because of a deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011); *see also Singh v. Ashcroft*, 367 F.3d 1182, 1185-86 (9th Cir. 2004) (where respondent filed motion to reopen on 91st day, the time for filing was equitably tolled due to former counsel's ineffective assistance in not filing brief resulting in summary dismissal); *Iturribarria v. INS*, 321 F.3d 889, 897-99 (9th Cir. 2003) (finding 90 days equitably tolled until respondent met with new counsel and became aware of previous counsel's ineffectiveness).

The Tenth Circuit is also in accord. *See Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) ("[a]fter an examination of the text, structure, legislative history, and purpose of Congress's 1990 amendment to the INA, we join the Second and Ninth Circuits and agree that there is no indication, either explicit or implicit, that Congress intended that this limitations period not be equitably tolled") (internal citations omitted).

The official position of the Eleventh Circuit was formerly that the 90-day deadline is jurisdictional. *See Abidi v. Att'y Gen. of the U.S.*, 430 F.3d 1148, 1150 (11th Cir. 2005); *see also Anin v. Reno*, 188 F.3d 1273,

1278-79 (11th Cir. 1999). However, the Eleventh Circuit reversed its view in *Avila-Santoyo v. AG*, 713 F.3d 1357, 1365 (11th Cir. 2013), holding that "the 90-day deadline for a motion to reopen is a non-jurisdictional claim-processing rule subject to equitable tolling."

In fact, the Fifth Circuit itself once determined in an unpublished decision that it had jurisdiction to examine petitions for review where an alien's motion to reopen was denied for untimeliness, but has since reversed course. *See Torabi v. Gonzalez*, 165 Fed. Appx. 326 (5th Cir. 2006) (unpublished) ("the denial was based solely on the motion's untimeliness under 8 C.F.R. § 1003.2(c)(2). Thus, we have jurisdiction to review the denial of Torabi's motion to reopen") (*citing Medina-Morales v. Ashcroft*, 371 F.3d 520, 525-27 (9th Cir. 2004) ("Because the 90-day limitations period under 8 C.F.R. § 1003.2(c)(2) is not jurisdictional, the doctrine of equitable tolling may be applied."). *Id.* at 331. *Medina* in turn cited *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005).

Because every single circuit but the Fifth agrees that it has jurisdiction to review BIA denials of requests for equitable tolling due to ineffective assistance of counsel, formerly including even the Fifth Circuit itself, Petitioner asks that the Court rule with finality that 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. § 1003.2(c)(2) are non-jurisdictional claim-processing rules and hence are subject to equitable tolling

without an implied request for the BIA to exercise its *sua sponte* power.

CONCLUSION

For the reasons explained above, Petitioner asks that his Petition for Certiorari be granted, and that he be given the opportunity to present his arguments before the Court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60253
Summary Calendar

NOEL REYES MATA,
also known as Alberto Reyes Reyes,

Petitioner

v.

ERIC H. HOLDER, JR.,
U. S. ATTORNEY GENERAL,

Respondent

Petitions for Review of an Order of the
Board of Immigration Appeals
BIA No. A200 723 795

(Filed Mar. 5, 2014)

Before BARKSDALE, HAYNES, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Noel Reyes Mata, a native and citizen of Mexico, was ordered removed from the United States in 2010.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

His appeal to the Board of Immigration Appeals (BIA) was dismissed after his attorney failed to file an appellate brief.

Mata subsequently filed an untimely motion to reopen his removal proceedings, based on a claim of ineffective assistance of counsel, and asking the BIA to equitably toll the applicable filing period or exercise its authority to reopen his proceedings *sua sponte*. The BIA denied Mata's motion.

Mata then filed a motion to reconsider. The BIA denied it as well.

Mata seeks review of the BIA's denial of his motions to reopen and to reconsider. He acknowledges his motion to reopen was filed outside the 90-day filing period, after the BIA dismissed his original appeal. *See* 8 C.F.R. § 1003.2(c)(2) (reopening or reconsideration before the BIA). He asserts, however, the BIA should have equitably tolled the filing period because his attorney's failure to file a brief to the BIA deprived him of his right to appeal and violated his due-process rights.

In this circuit, an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*. *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). As the BIA has complete discretion in determining whether to reopen *sua sponte* under 8 C.F.R. § 1003.2(a), and we have no meaningful standard against which to judge that exercise of

discretion, we lack jurisdiction to review such decisions. *Id.*

Although Mata challenges our court's decision in *Ramos-Bonilla* as decided incorrectly, we may not overturn the prior decision of another panel of our court, absent an intervening change in the law, such as a statutory amendment, or a contrary or superseding decision by either the Supreme Court or this court *en banc*. *E.g.*, *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). Along that line, Mata asserts the Supreme Court, in *Kucana v. Holder*, overturned this court's decision in *Ramos-Bonilla*. Mata overstates the reach of *Kucana*; there, the Supreme Court "express[ed] no opinion on whether federal courts may review the [BIA]'s decision not to reopen removal proceedings *sua sponte*". 558 U.S. 233, 251 n.18 (2010). Because we lack jurisdiction to review the BIA's denial of Mata's untimely motion to reopen, we need not address the merits of Mata's equitable-tolling, ineffective-assistance-of-counsel, and due-process claims.

Additionally, Mata appears to seek review of the BIA's denying his motion to reconsider its denial of his motion to reopen. He fails, however, to provide adequate briefing addressing the BIA's decision on the motion to reconsider, and, as such, has abandoned any challenge he might have raised regarding that decision. *See, e.g.*, *Thuri v. Ashcroft*, 380 F.3d 788, 793 (5th Cir. 2004).

DISMISSED in part; DENIED in part.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A200 723 795 – Houston, TX Date: JUN 27 2013

In re: NOEL REYES MATA a.k.a. Alberto Reyes Reyes

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: John Donovan
Assistant Chief Counsel

This case was last before us on March 22, 2013, at which time we denied the respondent's untimely motion to reopen proceedings based on alleged ineffective assistance of counsel. The respondent has now filed a timely motion to reconsider this decision on April 19, 2013. The Department of Homeland Security opposes the motion, which will be denied.

We find no reason to disturb our prior decision. *See* 8 C.F.R. § 1003.2; *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). The respondent's motion does not identify any specific error in our prior order, or call our attention to a change of law stated or relied upon in our earlier

[1] A courtesy copy of this decision will be mailed to Raed Gonzalez, Esquire, who apparently drafted the respondent's brief and motion.

decision, and we must deny his motion to reconsider. *Id.*

In support of his current motion, the respondent has submitted a proposed appellate brief, which, he argues, evidences the prejudice which he failed to demonstrate in his prior motion (Bd. Dec. at 1-2). Inasmuch as the respondent's motion may be construed as a request to reopen proceedings, his motion is barred by time and number limitations. *See* 8 C.F.R. § 1003.2(c)(2). Moreover, this proposed brief, if considered evidence, could have been proffered during the respondent's previous motion, and we find no other reason to grant the motion in our sua sponte authority. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). The motion will be, therefore, denied.

ORDER: The motion is denied.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A200 723 795 – Houston, TX Date: MAR 22 2013

In re: NOEL REYES MATA a.k.a. Alberto Reyes Reyes

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

ON BEHALF OF DHS: John Donovan
Assistant Chief Counsel

APPLICATION: Reopening

The Immigration Judge's August 24, 2011, decision denied the respondent's application for cancellation of removal to Mexico, holding that he is statutorily ineligible on account of his conviction under the Texas Penal Code of an offense involving moral turpitude. The Board entered the final administrative order on September 21, 2012, when we summarily dismissed the respondent's appeal for failure to file a statement of reasons for the appeal and unexplained failure to file a brief. The respondent filed this motion to reopen his removal proceedings on January 14, 2013. The motion is untimely. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i) (90-day time limit for filing motion to reopen). The Department of Homeland Security

has filed a memorandum opposing the motion. The motion will be denied.

In bringing this untimely motion to reopen, the respondent claims ineffective assistance of counsel. The Board held in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), that due process rights may be violated when ineffective assistance of counsel prevents an alien from reasonably presenting his case, and the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel. The alien must show that he was prejudiced by counsel's performance. Similarly, in *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003), *aff'd*, *Assaad v. Ashcroft*, 378 F.3d 471 (5th Cir. 2004), the Board recognized an ineffective assistance claim if counsel's representation was so deficient as to prevent the fundamental fairness of the proceeding, but also held that the alien must show prejudice, and will not establish prejudice if he does not document that he is eligible for the relief sought.

In *Matter of Lozada*, *supra*, the Board held that counsel's failure to file a statement of reasons and brief on appeal, although resulting in summary dismissal of the appeal, did not amount to deprivation of due process and was not prejudicial. The alien had received a full and fair hearing at which the Immigration Judge properly considered and evaluated the alien's evidence and correctly determined the legal issues. The same reasoning applies in the present matter. The respondent was convicted of assault under Texas law. The Immigration Judge properly applied the modified categorical approach and examined the

record of conviction to find that the respondent assaulted a family member (as defined) causing bodily injury. The offense therefore went beyond simple assault or offensive touching, and constituted a crime involving moral turpitude. *See* I.J. at 5-9. The respondent's motion does not include a proposed appellate brief or other argument to persuade the Board that the Immigration Judge's decision was incorrect or would have been overturned on appeal if a brief had been filed.[1]

Because the respondent's conviction makes him ineligible for cancellation of removal, the Immigration Judge did not reach the issue of whether the respondent's removal from the United States would result in exceptional and extremely unusual hardship to a qualifying relative. *See* section 240A(b)(1)(D) of the Act, 8 U.S.C. § 1229b(b)(1)(D). The present motion addresses that issue only briefly, with the respondent's affidavit making mention of difficulties in adjustment, loss of educational and economic opportunity, and general conditions of violence in Mexico. Such

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[1] The respondent filed a supplemental memorandum that the Board received on February 5, 2013, addressing, inter alia, the effect of *Esparza-Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012), decided after the Board issued the final administrative order in this matter. The United States Court of Appeals for the Fifth Circuit upheld the Board's modified categorical approach with respect to a related Texas criminal statute, where the record of conviction showed that the assault caused physical injury and went beyond offensive touching. Thus, the Fifth Circuit's decision does not lead to a different result in the respondent's case.

hardships, though real, are common when a family member is removed, and are not "exceptional and extremely unusual" hardships within the meaning of the Act. Therefore, aside from the respondent's ineligibility due to his conviction, the motion to reopen does not document that he is eligible for the relief sought. *See Matter of Assaad*, *supra*.

For the above reasons, the respondent's motion does not demonstrate an exceptional situation that would warrant reopening as an exercise of discretion. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). Accordingly, the untimely motion will be denied.

ORDER: The motion to reopen is denied.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File A 200 723 795 **August 24, 2011**

In the Matter of

NOEL REYES MATA,	)	**IN REMOVAL**
	)	**PROCEEDINGS**
Respondent	)	

CHARGE: **Section 212(a)(6)(A)(1) of the Immigration and Nationality Act, as amended.**

APPLICATION: **Cancellation of removal for certain unlawful permanent residents pursuant to Section 240A(b)(1) of the Immigration and Nationality Act, as amended.**

ON BEHALF OF RESPONDENT:	**ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:**
Aseph Almas, Esquire **440 Benmar Drive** **Houston, Texas 77060**	**John Donovan, Esquire** **Assistant Chief Counsel** **ICE Office of the Chief Counsel** **Houston, Texas**

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Introduction

THE DEPARTMENT OF HOMELAND SECURITY (DHS) commenced these removal proceedings against respondent on September 21, 2010, charging him with being removable pursuant to the above-captioned section of the Immigration and Nationality Act. The hearings in this matter were conducted in Houston, Texas.

At a master calendar hearing held on January 24, 2011, respondent admitted the factual allegations and conceded removability as charged in the Notice to Appear (NTA). Respondent designated Mexico as the country of removal. Should removal become necessary based on respondent's admissions and concessions, in addition to the information memorialized in Exhibit 2, the Court found him removable as set forth in the NTA by clear and convincing evidence. As to relief from removal, the respondent applied for cancellation of removal for certain unlawful permanent residents under Section 240B(a)(1) of the Act. It is respondent's eligibility for such relief that is currently before this Court.

For the reasons set forth below, the Court will deny respondent's cancellation application, Form EOIR-42B as a matter of law.

II. Summary of Evidentiary Record

The record in this case consists of the admission of four Exhibits.

Exhibit 1 is the NTA dated September 15th, 2010. It was filed by DHS on September 21, 2010.

Exhibit 2 is a record of deportable/inadmissible alien, Form I-213, dated September 15, 2010.

Exhibit 3 consists of criminal records relating to respondent's conviction for Assault-Family Member entered on September 14, 2010. The documents are tabbed A-D.

Exhibit 4 consists of respondent's Form EOIR-42B and supporting documents, tabbed A-E.

All admitted evidence identified above has been considered regardless of whether specifically mentioned in the text of this decision.

III. Factual Background

The facts regarding respondent's criminal history are not in dispute. On or about September 14, 2010, respondent pleaded guilty to, and was convicted for, the Class A misdemeanor of Assault-Family Member and *see* Exhibit 3 Tabs A-B. His victim was Vanessa Hernandez, an individual identified as a person with whom respondent had a dating relationship.

The criminal court also made an affirmative finding of family violence in connection with the offense,

see Exhibit 3, Tab B. Prior to the conviction, respondent was ordered to remain away from Ms. Hernandez for 60 days in connection with the entry of an emergency protective order, *see* Exhibit 3 Tab C. For the assault offense, respondent was sentenced to 30 days in county jail.

IV. Statement of the Law

A. Cancellation of Removal for Non-Lawful Permanent Residents

The Legal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), abolished suspension of deportation under former Section 240A of the Act and replaced it with a restrictive procedure called cancellation of removal, effective April 1, 1997, *see* IIRIRA Sec. 304(a)(3); INA Sec. 240A(b)(1). As an applicant for cancellation of removal under Section 240A(b)(1) of the Act, an alien must demonstrate: (1) physical presence in the United States for a continuous period of not less than 10 years immediately preceding the date of application; (2) good moral character during that period; (3) no criminal convictions which are offenses under Section 212(a)(2), 237(a)(2) or 237(a)(3); and (4) removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a United States citizen or lawful permanent resident. The applicant's hardship is no longer considered under INA Sec. 240A(b)(1).

B. Crime Involving Moral Turpitude

The term "moral turpitude" is not defined by the Act and has been described as a nebulous concept by the courts, see, e.g.; *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). In identifying conduct that is inherently depraved or intrinsically wrong, courts often look for certain aggravating factors, such as perpetrator's use of unjustified violence or a deadly weapon, the endangerment of human life or the presence of criminal or evil intent. Fundamental to that determination is whether the Act is accompanied by a vicious motive or a corrupt mind, *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996).

Pursuant to the Attorney General's decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), this Court must first examine the statutory elements of the conviction under a categorical approach, then, if necessary, consider the record of conviction under a modified categorical approach and can, if necessary, and appropriate, consider evidence beyond the formal record of conviction. The Court may examine documents such as the indictment, the judgment and conviction, jury instructions, assign guilty plea, and a plea transcript. *See Matter of Short*, 20 I&N Dec. 135, 137 (BIA 1989); *Hyder v. Keisler*, 506 F.3d 388, 391 (5th Cir. 2007).

V. Findings of the Court

Inasmuch as respondent's application for cancellation of removal was filed after May 11, 2005, it is

governed by the provisions of the REAL ID Act of 2005. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). In that regard, respondent fully bears the burden of establishing that he is eligible for the relief that he seeks.

For the reasons set forth below, the Court finds that respondent is statutorily ineligible for cancellation of removal as a matter of law and will pretermit his application. Respondent's conviction for Assault-Family Member is a crime involving moral turpitude, which renders him ineligible for cancellation of removal under Section 240A(b)(1)(C) of the Act.

There is no dispute the respondent pleaded guilty to, and was convicted for, the Class A misdemeanor of assault with an affirmative finding that the victim of the crime was a member of his family. *See* Exhibit 3, Tabs A-B. Under Section 22.01(a)(1) of the Texas Penal Code, a person commits a Class A misdemeanor if he intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse. Texas Penal Code 22.01(a)(1). Section 22.01(a)(1) of the Texas Penal Code is divisible, and that it includes offenses that would be considered crimes involving moral turpitude, as well as offenses that would not, first, it covers simple assaults, which the Board has generally held do not involve moral turpitude, *see Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007); *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992). Section 22.01(a)(1) also covers assault against a spouse, which the Board has found in some cases to

be a crime involving moral turpitude because inflicting harm upon a family member is of a different, more serious nature than inflicting harm upon a stranger. *See Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996); *Matter of Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006).

The state statute at issue here is divisible. The Court must use a modified categorical approach and examine the respondent's record of conviction. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 690 (A.G. 2008). Respondent's judgment of conviction indicates that the presiding judge made an affirmative finding of family violence, *see* Exhibit 3, Tab B, Page 3. Additionally, the criminal information to which respondent pleaded guilty indicates that respondent did unlawfully, intentionally, and knowingly cause bodily injury to Vanessa Hernandez, a person with whom he had a dating relationship, by striking her with his foot and grabbing her with his hand. Under Texas law, a family member is defined as a person in a dating relationship, *see* Tex. Penal Code Ann. Section 22.01(b)(2) (West Subperiod 2010); Tex. Fam. Code Ann. Section 71.0021(b), 71.003, 71.005 (West 2010). Texas law further defines a dating relationship as a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. It does not include a casual acquaintance in a business or social context. Tex. Fam. Code Ann. Section 71.0021(b)-(c).

The Court finds that the respondent's intentional acts of striking or grabbing another with whom he has a close, personal relationship and causing a physical

injury is morally reprehensible and necessarily involves turpitude and misconduct, and thus is a crime involving moral turpitude. *See Matter of Tran*, 21 I&N Dec. 294; *Matter of Sanudo*, 23 I&N Dec. 972. Under Texas law, the maximum punishment for a Class A misdemeanor is one year. *See* Tex. Penal Code Section 12.21(2).

The dispositive issue then becomes whether or not such conviction is described under Section 212(a)(2), 237(a)(2) or 237(a)(3) of the Act, thereby rendering the respondent ineligible for cancellation of removal, *see* I&N Sec. 240A(b)(1)(C). The Board clarified the analysis required in order to determine this question of law in recent precedent decisions. *See Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010). In Cortez, the Board explained that in order to determine if a crime involving moral turpitude is described under Sections 212(a)(2), 237(a)(2) or 237(a)(3) of the Act, only language specifically pertaining to the criminal offense, such as the offense itself, in a sense, imposed or potentially imposed, should be considered. *Matter of Cortez*, 25 I&N Dec. 307. The Board further explained that statutory language relating only to aspects of Immigration Law, such as the requirement under Section 237(a)(2) that an offense be committed within five years after the date of admission is not to be considered a crime involving moral turpitude analysis. The Board concluded that in order for an offense to be described under Section 237(a)(2)(A)(i) of the Act and render a respondent ineligible for cancellation,

the crime must be a crime involving moral turpitude and must be punishable by a sentence to imprisonment for a year or longer. *Matter of Cortez*, 25 I&N Dec. 307.

In light of Board precedent, this Court concludes that respondent has been convicted of an offense described under Section 237(a)(2) of the Act, a crime involving moral turpitude for which a sentence of one year or longer may be imposed and is thus ineligible for relief of cancellation of removal. Furthermore, the question of whether respondent's conviction qualifies for a petty offense exception under 212(a)(2)(A)(ii)(II) of the Act need not be determined, because regardless of the results of such inquiry, the conviction remains an offense described under Section 237(e)(2). Therefore, the Court further concludes that respondent's conviction for assault to a family member renders him ineligible for cancellation of removal.

Respondent has not identified any other form of relief. The circumstances in these proceedings leave no alternative except to issue an order of removal to respondent's native country of Mexico.

VI. Conclusion and Orders

For the reasons discussed, the following orders will enter:

ORDER

IT IS HEREBY ORDERED that respondent's application for cancelation of removal for certain

non-permanent residents under Section 240A(b) of the Immigration and Nationality Act, as amended, is pretermitted and denied as a matter of law.

IT IS FURTHER ORDERED that respondent shall be removed to Mexico on the charge specified in the Notice to Appear, dated September 15, 2010.[1]

Appeal due September 23, 2011.

Date: August 24, 2011.

LISA LUIS
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before LISA LUIS, in the matter of:

NOEL REYES MATA
A 200 723 795
Houston, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

[1] Respondent will be advised of his appeal rights separately on the record.

/s/ Michael L. Perlman
Michael L. Perlman (Transcriber)

Deposition Services, Inc.
12321 Middlebrook Rd., Suite 210
Germantown, Maryland 20874
(301) 881-3344

September 23, 2011
(Completion Date)

IMMIGRATION COURT
2320 LA BRANCH ST., RM 2235
HOUSTON, TX 77004

In the Matter of Case No.: A200-723-795

REYES MATA, NOEL
Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Aug. 24, 2011. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to MEXICO, ~~or in the alternative to~~

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to.

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to MEXICO.

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] A Waiver under Section ___ was ( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[X] Cancellation under section 240A(b)(1) was ( ) granted (X) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ___ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture's was granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ until ___.

[ ] As a condition of admission, respondent is to post a $ ___ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: Aug 24, 2011

/s/ Lisa Luis
Lisa Luis
Immigration Judge

Appeal: Waived/Reserved By Respondent

Appeal Due By: Sept. 23, 2011

ALIEN NUMBER: 200-723-795

ALIEN NAME: REYES MATA, NOEL

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [X] ALIEN's ATT/REP [X] DHS

DATE: 8-24-11 BY: COURT STAFF Lisa Luis

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60253

NOEL REYES MATA, also known as Alberto Reyes Reyes,

Petitioner

v.

ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Filed May 16, 2014)

(Opinion ___, 5 Cir., ___, ___,F. 3d ___)

Before BARKSDALE, HAYNES, and HIGGINSON, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be

polled on Rehearing En Banc (FED R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
UNITED STATES CIRCUIT JUDGE